Supreme Court, U.S.
FILED
APR 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1467

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Petitioner,

v.

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY MEMORANDUM

Of Counsel:

W. J. MCANELLY, JR.
EDWARD DE LA GARZA
EXXON COMPANY, U.S.A.
800 Bell Street
Houston, Texas 77002

KEITH A. JONES *
FULBRIGHT & JAWORSKI
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-6800

J. RUFUS WALLINGFORD
TOM ALAN CUNNINGHAM
SARAH B. DUNCAN
C. MARK BAKER
FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF AUTHORITIES

CASES: Page

B. A. Commercial Corp. v. Hynutek, Inc., 705 S.W.2d 713 (Tex. App. —— Dallas 1986, no writ) 2, 3
Chevron Oil Co. v. E. D. Walton Construction Co., 517 F.2d 1119 (5th Cir. 1975) 3
Delano v. Kitch, 663 F.2d 990 (10th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982) 4
East Girard Savings Ass'n v. Citizens National Bank & Trust Co., 593 F.2d 598 (5th Cir. 1979) .. 1
Erie R. Co. v. Tompkins, 304 U.S. 64 (1938) 4, 5
Kerr Construction Co. v. Plains National Bank, No. 07-86-0205-CV (Tex. App. —— Amarillo 1987, application for writ of error pending) .....*passim*
Republic National Bank v. Northwest National Bank, 578 S.W.2d 109 (Tex. 1978) 1
Richland Plantation Co. v. Justiss-Mears Oil Co., 671 F.2d 154 (5th Cir. 1982) 3
Temple-Eastex, Inc. v. Addison Bank, 672 S.W.2d 793 (Tex. 1984) 3
Witt v. Harlan, 2 S.W. 41 (Tex. 1886) 3

OTHER:

Tex. R. App. P. 1(a) 5
Tex. R. App. P. 90(h) 4

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1467

EXXON COMPANY, U.S.A.,
A DIVISION OF EXXON CORPORATION,
Petitioner,

v.

BANQUE DE PARIS ET DES PAYS-BAS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

---

REPLY MEMORANDUM

---

1. At the outset of its brief in opposition, Paribas suggests that the Fifth Circuit's opinion in this case represents a conscientious effort to apply "well-settled principles of Texas law." Br. in Opp. at 1. The opinion itself does not support that suggestion.

As Paribas acknowledges, the Fifth Circuit cited only two Texas decisions. Br. in Opp. at 1-2 n.1. One, *Republic National Bank v. Northwest National Bank*, 578 S.W. 2d 109 (Tex. 1978), was cited only for the uncontroverted proposition that a letter of credit is a contract between the issuer and the beneficiary. *See* Pet. App. 6a.[1] The

---

[1] The Fifth Circuit also cited its own earlier decision in *East Girard Savings Ass'n v. Citizens National Bank & Trust Co.*, 593 F.2d 598 (5th Cir. 1979), for the same proposition.

other, *B. A. Commercial Corp. v. Hynutek, Inc.*, 705 S.W.2d 713 (Tex. App. —— Dallas 1986, no writ), was cited as "cf." authority for the proposition that the letter of credit at issue here contained "no uncertainty . . . as to its expiration date." Pet. App. 9a.

In thus citing *B. A. Commercial*, the Fifth Circuit completely ignored the Texas court's rationale. The district court below explained:

> *B A Commercial* . . . supports Exxon's position. In that case the court construed a letter of guaranty that required Hynutek to certify by December 31 that certain payments were more than twenty-five days past due. A payment fell due on December 31, and Hynutek made demand upon the guarantor at the end of January.
>
> . . . [T]he court in *B A Commercial* identified and applied the rules of construction that resolve this case.
>
> > [A] fair reading of the guaranty shows that such an interpretation would defeat the express intent of the parties.
> >
> > * * * *
> >
> > [R]equiring that 25 days notice be given by December 31, 1983, would, in effect, have made a proper demand technically impossible and, therefore, would be contrary to the intent of the parties.
>
> *B A Commercial*, 705 S.W.2d at 716. The word "purpose" could be well substituted for "intent" in those two passages.

Pet. App. 15a. The district court correctly concluded, in light of *B. A. Commercial* and other Texas authorities, that Paribas's suggested reading of the letter of credit in this case was contrary to the purpose of the contracting parties and therefore was wrong.

The Fifth Circuit ignored not only the district court's application of Texas authorities but also the rules of

contract construction that the Texas courts in *B. A. Commercial* and *Kerr Construction Co. v. Plains National Bank*, No. 07-86-0205-CV (Tex. App.—Amarillo 1987, application for writ of error pending), found controlling:

> (1) "If two constructions are possible, a construction rendering the contract possible of performance will be preferred to one that renders its performance impossible or meaningless." *Temple-Eastex, Inc. v. Addison Bank*, 672 S.W.2d 793, 798 (Tex. 1984).
>
> (2) When contractual provisions appear to conflict, the first provision appearing in the document controls. *Witt v. Harlan*, 2 S.W. 41, 42 (Tex. 1886).
>
> (3) A letter of credit must be construed against the issuer. *Temple-Eastex*, 672 S.W.2d at 798.[2]

In short, the Fifth Circuit's opinion does not conform to "well-settled principles of Texas law." Br. in Opp. at 1.

2. The Fifth Circuit's failure properly to apply Texas law was made manifest by the decision in *Kerr Construction*. Paribas argues that *Kerr Construction* "would have been accorded [no weight] in a Texas state court." Br. in Opp. at 4. That is wrong.

If this case had not been removed to federal court, it would have proceeded in state court in parallel with *Kerr Construction*. If it had been decided by an intermediate court of appeals in the same manner as *Kerr Construction*, the Texas Supreme Court would have been presented with two cases having virtually identical facts and holdings; if it had been decided by an intermediate court of appeals in a manner contrary to *Kerr Construction*, the Texas Supreme Court could and would have been asked to consolidate the cases and resolve the con-

---

[2] Instead, the Fifth Circuit cited two of its own decisions, *Richland Plantation Co. v. Justiss-Mears Oil Co.*, 671 F.2d 154 (5th Cir. 1982), and *Chevron Oil Co. v. E. D. Walton Construction Co.*, 517 F.2d 1119 (5th Cir. 1975), for the proposition that interpreting a contract against its author is "a rule of construction that *generally* applies only to clarify ambiguity." Pet. App. 5a (emphasis added).

flict. *See* Pet. 14-15. In either event, the Texas Supreme Court would have given thoughtful consideration and accorded substantial weight to the opinion of the intermediate court of appeals in *Kerr Construction*.

By the same token, if the Fifth Circuit had certified the question of contract interpretation in this case to the Texas Supreme Court for consideration in tandem with *Kerr Construction*, as Exxon requested, the Texas Supreme Court would have been able to assess and evaluate the Fifth Circuit's reasoning as well as that of the intermediate court of appeals in *Kerr Construction*. The Fifth Circuit's refusal to certify, and its hasty disposition of Exxon's second petition for rehearing, indicates an unwillingness to subject its handling of the legal issue in this case to the scrutiny of the Texas Supreme Court —an unwillingness that is fundamentally at odds with the open acceptance of state law required by *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). *Cf. Delano v. Kitch*, 663 F.2d 990, 996 (10th Cir. 1981), *cert. denied*, 456 U.S. 946 (1982) ("it is the duty of the Federal court that still has jurisdiction of the case to conform its decision and judgment to the latest decision of the supreme court of the state").

3. Paribas's opposition to certiorari is based exclusively on the fact that the opinion in *Kerr Construction* has not been published. But Paribas, like the Fifth Circuit, is somewhat over-eager on that score. The issue of publication remains open. As Paribas concedes, a motion to publish "is still pending" before the Texas Supreme Court. Br. in Opp. at 2 n.3. Once the Texas Supreme Court acts on the pending application for writ of error in *Kerr Construction*, the "opinion previously unpublished shall forthwith be released for publication, if the [Texas] Supreme Court so orders." Tex. R. App. P. 90(h).[3]

---

[3] Paribas incorrectly asserts that, in the meantime, it is a violation of Texas Rules of Appellate Procedure for Exxon even to

Publication of the opinion in *Kerr Construction* is likely if the writ of error is refused and is particularly likely if it is refused with the notation "no reversible error;" such a notation would place the explicit imprimatur of the Texas Supreme Court on the opinion of the intermediate court of appeals. Especially in light of that possibility, this case should not be finally adjudicated adversely to Exxon in the federal courts in advance of a decision by the Texas Supreme Court in *Kerr Construction*. Under *Erie*, Exxon is entitled to have its Texas contract construed and enforced in accordance with Texas law in the same manner as if the litigation had proceeded in Texas courts.

For the reasons stated here and in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

Of Counsel:

W. J. McANELLY, JR.
EDWARD DE LA GARZA
EXXON COMPANY, U.S.A.
800 Bell Street
Houston, Texas 77002

KEITH A. JONES *
FULBRIGHT & JAWORSKI
1150 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 452-6800

J. RUFUS WALLINGFORD
TOM ALAN CUNNINGHAM
SARAH B. DUNCAN
C. MARK BAKER
FULBRIGHT & JAWORSKI
1301 McKinney Street
Houston, Texas 77010
(713) 651-5151

* Counsel of Record

---

refer to the unpublished opinion in *Kerr Construction* either here or in the Fifth Circuit. As their very name implies, those Rules govern procedure only in Texas courts. *See* Tex. R. App. P. 1(a). Moreover, the Rules do not bar motions to consolidate for the purpose of resolving conflict.